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Via ECF

The Honorable James Donato
United States District Court for the Northern District of California
450 Golden Gate Avenue
San Francisco, CA 94102

Re: Singer, et al. v. Facebook, Inc., Case No. 3:18-cv-04978

Dear Judge Donato:

Plaintiffs seek an order compelling Facebook to cease and desist destroying relevant data. Plaintiffs further seek an order compelling Facebook to identify its electronic repositories containing user base information and its preservation practices with respect to those repositories. The undersigned certifies that lead counsel for Plaintiffs has met and conferred with lead counsel for Facebook pursuant to this Court's Civil Discovery Standing Order and the Civil Local Rules.

This is a class action brought by advertisers alleging Facebook inflated its Potential Reach metric, its "estimation of how many people are in an ad set's target audience." Compl., ECF No. 55, ¶ 3. Potential Reach is derived, at least in part, from Facebook's user base data. *Id.* at ¶¶ 35-36. Accordingly, Facebook's user base data is one of the central – if not the central – piece of evidence in this case. During multiple lengthy meet-and-confers over several months, Plaintiffs repeatedly asked Facebook two simple questions: 1) what systems house Facebook's user base data, and 2) is Facebook preserving or deleting that data? Facebook steadfastly refuses to directly answer.

This issue has taken on greater urgency in light of Facebook's recent disclosures that 1) it has taken steps to *correct* its Potential Reach metric, and 2) Facebook deletes some data tables that store user data on a rolling 90-day basis. Given Facebook's Potential Reach correction, Plaintiffs demanded Facebook stop deleting data tables that store user data. Facebook refused. Accordingly, at this very moment, Facebook continues to destroy relevant information. The Court should order Facebook to cease and desist destroying potentially relevant documents, and to provide threshold information regarding its electronic repositories and preservation practices.

I. FACTUAL BACKGROUND

On August 15, 2018, Plaintiffs filed this action against Facebook. On November 8, 2018, Plaintiffs served Facebook their First Set of Interrogatories and Requests for Production. Interrogatory No. 2 seeks basic information (name, fields, method of query, location, and manager) regarding Facebook's data repositories, including repositories housing user base data. *See* Ex. 1, Interrogatory No 2. In their RFPs, Plaintiffs request that Facebook produce (at least a sample of) its user base data. That data production is critical so Plaintiffs can measure the level of Potential Reach inflation for the putative class. Plaintiffs have repeatedly informed Facebook that Plaintiffs will work with Facebook to identify a reasonable and proportional sample, but that Facebook must provide basic information so that the parties can undertake an informed negotiation.

Plaintiffs have attempted to work with Facebook to agree on an ESI Protocol and scope of production since February 2019. But Facebook continues to impede negotiations by refusing to provide threshold information regarding its electronic repositories containing user base data. Facebook states only that user base data is housed in “Facebook’s core technology,” or in the “Facebook universe.” Facebook also refuses to respond to Interrogatory No. 2.¹ Finally, Facebook refuses to agree to an ESI Protocol provision that requires the parties to disclose basic information about relevant databases to “facilitate” a “meet-and-confer” regarding production.

Facebook avers that it is preserving “relevant” information, but then states that user base data is not relevant to Plaintiffs’ claims. Facebook also contends that preserving *any* user base data would not be proportional to the needs of the case. Facebook conflates preserving *any* user base data with preserving *all* user base data – and never directly states what it is preserving and deleting. When pressed, however, Facebook acknowledged that it does delete on a rolling 90-day basis data tables containing user base data.

In early April 2019, Plaintiffs learned that Facebook had recently taken steps to correct its Potential Reach metric. On March 12, 2019, Facebook publicly disclosed that Potential Reach is “now based on how many people have been shown an ad on a Facebook Product in the past 30 days who match [the advertiser’s] desired audience and placement criteria.” Facebook explained it had “previously based [Potential Reach] estimates on people who were active users in the past 30 days.”² Facebook told advertisers that “[y]ou may see a decrease in audience size as a result of this change.” Plaintiffs demanded Facebook immediately confirm it is preserving user base data. Plaintiffs’ concern was urgent due to Facebook’s practice of deleting user base data on a rolling 90-day basis. Facebook refused to halt its deletion practices.

II. FACEBOOK MUST IMMEDIATELY CEASE AND DESIST DESTROYING POTENTIALLY RELEVANT DOCUMENTS

The Court should order Facebook to immediately cease and desist deleting user base data stored in its 90-day tables. As this Court has previously noted, “the obligation to preserve evidence under the rules includes all potentially relevant documents that are within the Defendant’s custody or control.” *Levi v. Comcast Holdings Corp.*, 2014 WL 12646043 (N.D. Cal., Jun. 2, 2014) (Donato, J.); *see also, Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003) (party must preserve documents “reasonably likely to be requested during discovery and/or is the subject of a pending discovery request”). “The duty to preserve evidence is a duty owed to the *court*, not to the party’s potential adversary, hence, spoliation is considered an abuse of the judicial process.”

¹ Facebook initially responded that it would meet and confer with Plaintiffs about a proper scope for Rog No. 2. *See* Exhibit 2, Facebook’s Response to Rog. No. 2. During a March 19, 2019 meet-and-confer, Facebook told Plaintiffs that it would fully respond to Rog. No. 2 after the parties entered a protective order. Yet, on April 15, Facebook informed Plaintiffs that they are not entitled to any response to Interrogatory No 2. Facebook’s one step-forward, two-steps back approach to discovery negotiations is delaying discovery on many fronts.

² https://www.facebook.com/business/help/567031670465069?helpref=faq_content. This post further confirms that Facebook’s user base data is used to calculate Potential Reach.

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Ashton v. Knight Transp., Inc. 772 F. Supp. 2d 772, 800 (N.D. Tex. 2011) (emphasis in original).

Here, there is no question that user base data is highly relevant. The preservation request is also not disproportionate. Plaintiffs do not demand that Facebook preserve or produce every shred of information in its possession. Rather, Plaintiffs ask Facebook to suspend its destruction of the user base data so that the parties can negotiate a reasonable scope of data for preservation and production. ***Absent Court intervention, due to the 90-day deletion policy, Facebook will finish deleting user base data created prior to its March Potential Reach calculation change by June 12.*** Facebook suggests that preserving the evidence will involve storing an inordinate amount of data (petabytes). Facebook, however, offers no cost estimate for storing the data. Based on the limited information provided by Facebook, and publicly available information, the cost would not be highly burdensome.³

III. FACEBOOK SHOULD BE ORDERED TO IDENTIFY RELEVANT ELECTRONIC REPOSITORIES AND ITS PRESERVATION PRACTICES

The Court should also order Facebook (a) to identify and provide basic information about the electronic repositories utilized to store user base information (in response to Interrogatory No. 2); and (b) to state clearly its document preservation practices with respect to those databases. Although Facebook's refusal to provide this threshold information is impeding discovery, Facebook claims, without any explanation, that it is too burdensome. None of these objections, however, are relevant to providing the requested information: disclosure of the relevant electronic systems and its preservation practices are a prerequisite to having an informed discussion regarding the establishment of appropriate preservation protocols and the proper scope of production. Although Facebook has repeatedly asserted that user base data is stored in "Facebook's core technology," or in the "Facebook universe," these are not databases or repositories—they are attempts to evade Plaintiffs' question. These evasion tactics only stymy the discovery process and cannot be permitted.

IV. CONCLUSION

For the foregoing reasons, the Court should order Facebook (1) to immediately cease and desist destroying its user base data; and (2) to identify relevant electronic repositories containing user base information and Facebook's preservation practices with respect to those repositories.

Respectfully submitted,

/s/ Geoffrey Graber
 Geoffrey Graber (counsel for Plaintiffs)

cc: Counsel for All Parties (via ECF)

³ Publicly available pricing indicates that storage of 1 petabyte is available for as little as \$990 per month. See <https://aws.amazon.com/s3/pricing/?nc=sn&loc=4>. Of course, Facebook's storage costs would certainly be a fraction of the publicly available, rack rate. Facebook reportedly processed four petabytes of data *per day* as of 2014. Janet Wiener, Nathan Bronson, "Facebook's Top Open Data Problems," Facebook Research (Oct. 22, 2014), available at <https://research.fb.com/facebook-s-top-open-data-problems/>.